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Supreme Court of the United States

OCTOBER TERM, 1959

ARKOMA TRANSPORT ASSOCIATION, INC., ET AL.,
Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STEPHEN ALES,
1109 Shoreham Bldg.,
Washington 5, D. C.

HUGH B. COX,
507 Union Trust Bldg.,
Washington 5, D. C.

DOUGLAS F. SMITH,
11 So. La Salle St.,
Chicago 3, Ill.

EDWARD K. WHEELER,
Southern Bldg.,
Washington 5, D. C.

Attorneys for Respondents

DEC. 24, 1959

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 545

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL.,

Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioners here seek review of a *per curiam* order of the Court of Appeals which in effect refused to review and reverse an unappealable interlocutory order of the District Court. The order of the District Court in turn had referred to the Interstate Commerce Commission for initial consideration certain transportation questions presented in an inter-industry private antitrust action brought by petitioner non-scheduled air carriers against respondent railroads. The petition presents no question appropriate for review by this Court at this intermediate stage of the litigation. It should be denied.

OPINIONS BELOW

The only opinion or decision below which is open to review on this petition for certiorari is the unreported *per curiam* order of the Court of Appeals of September 23, 1959, denying petitioners' motion for recall and clarification of mandate (Pet. App. H, R. 466), motion for clarification or amendment denied, October 20, 1959 (R. 474), petition for rehearing *en banc* denied, November 2, 1959 (R. 500). Prior opinions and orders rendered in the course of this litigation include: District Court, July 5, 1957, 154 F. Supp. 106, J.A. 219-220; Court of Appeals, February 25, 1958, 253 F. 2d 877, Pet. App. A, R. 230; District Court, April 18, 1958, Pet. App. B, R. 300; Interstate Commerce Commission, January 27, 1959, Pet. App. C, R. 448; District Court, February 24 and March 2, 1959, Pet. App. F and G, R. 453 and 463.

JURISDICTION

The *per curiam* order of the Court of Appeals of September 23, 1959 (Pet. App. H, R. 466), motion for clarification or amendment denied, October 20, 1959 (R. 474), petition for rehearing *en banc* denied, November 2, 1959 (R. 500), is properly within the jurisdiction of this Court to review under 28 U.S.C. § 1254(1). No timely petition for certiorari was filed to review the earlier judgment of the Court of Appeals of February 25, 1958 (102 U.S. App. D.C. 355, 253 F.2d 877, Pet. App. A, R. 230), and this decision is accordingly not now reviewable on certiorari.

QUESTION PRESENTED

None of the questions stated in the petition (pp. 3-4) is believed to be properly presented by the Court of Appeals' order of September 23, 1959, now sought

to be reviewed; in fact, respondents submit that no broad or important questions of law or policy are presented for determination in the present procedural posture of this case.

The only question now properly presented to this Court is whether the Court of Appeals abused its discretion in denying petitioners' "Motion for Recall and Clarification of Mandate" and in thereby refusing to review, reverse or modify an unappealable interlocutory order of the District Court. This order of the District Court had withheld decision on a question of violation of the antitrust laws by respondent railroads in engaging in certain alleged concerted rate practices in connection with group military passenger traffic under Section 22 of the Interstate Commerce Act until determination by the Interstate Commerce Commission of the question of the nature, intent and effect of such alleged rate practices and of whether they fell within the scope of approved Section 5a agreements and of the Commission's orders approving such agreements. The District Court had specifically refused to certify its interlocutory order for review under the Interlocutory Appeals Act of 1958, 72 Stat. 1770, 28 U.S.C. §1292(b).

STATUTES INVOLVED

In addition to the statutory provisions quoted in Appendix I to the petition for certiorari (pp. 61-66), reference should be made to the provisions of the National Transportation Policy contained in the Interstate Commerce Act, 54 Stat. 899, 49 U.S.C. preceding §§ 1, 301, 901 and 1001. The full text of this statutory policy is set out in an Appendix to this brief (p. 25).

STATEMENT

In order to give the Court an understanding of the present posture of this litigation and the real nature of the *per curiam* order of the Court of Appeals which is now sought to be reviewed on certiorari, a more connected statement of the case is needed than is contained in the petition.

On April 10, 1957, a number of non-scheduled or supplementary air carriers and their association brought this private antitrust action for injunction and treble damages against most of the leading passenger-carrying railroads in the northeastern and western parts of the United States. The gravamen of the complaint was that the respondent railroads had conspired to injure the competing air carriers by concertedly submitting to the military agencies reduced rates under Section 22 of the Interstate Commerce Act for the transportation of group military traffic. Prior to answer, the respondents moved to dismiss and for summary judgment, contending that whatever concerted rate activities had been engaged in were undertaken pursuant to agreements approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act and were thus relieved from the antitrust laws under the provisions of Section 5a(9) of that Act. The petitioner air carriers filed a cross-motion for summary judgment on the ground that all Section 22 rates to the Government were beyond the coverage of the exemption provided by Section 5a, and that without such exemption the mere fact that such rate quotations were made in concert by otherwise competing railroads made them *per se* violations of the antitrust laws.

The District Court on July 5, 1957, denied the respondents' motions, granted the petitioners' cross-mo-

tion for summary judgment and entered an injunction, holding that "the antitrust immunity conferred by Section 5a of the Interstate Commerce Act does not apply to concerted Section 22 quotations made to the United States Government."[1] The respondent railroads appealed the granting of this injunction to the Court of Appeals for the District of Columbia Circuit. While these appeals were pending, Congress on August 31, 1957, amended Section 22 of the Interstate Commerce Act by adding a subsection which prescribes certain filing procedures for Section 22 quotations made to the Government and which now removes all doubt as to the applicability of the antitrust exemptions of Section 5a to such quotations. See Act of August 31, 1957, 71 Stat. 564, 49 U.S.C. § 22(2), Pet. App. I, p. 65.

In its opinion of February 25, 1958, the Court of Appeals reversed the summary judgment for petitioners which had been granted by the District Court, and held that not all Section 22 rate quotations made prior to the amendment of August 31, 1957, were beyond the coverage of Section 5a of the Interstate Commerce Act. *Atchison, T. & S. F. Railway Co., et al.* v. *Aircoach Transport Association, Inc.*, 102 U.S. App. D.C. 355, 253 F.2d 877, Pet. App. A, p. 31. The court further ruled that the District Court, while retaining jurisdic-

[1] Answers and counterclaims were thereafter filed by the various respondent railroads denying all material allegations of the complaint, including those relating to the nature of the rate practices challenged in the complaint. Respondents also alleged that the petitioner air carriers had themselves violated the antitrust laws to the injury of the respondent railroads by engaging in various illegal concerted bidding activities in connection with group military traffic. These answers and counterclaims, however, were not before the Court of Appeals on the summary judgment appeal.

tion, should withhold decision on the interpretation of Section 5a and of existing agreements approved by the Interstate Commerce Commission under that section until the Commission had an opportunity to decide initially the question of whether the particular rate practices involved here were covered by the statute and by the approved agreements. The Court of Appeals held that the applicability of Section 5a to Section 22 rates might vary depending on the particular type of Section 22 rate activity involved, and this holding brought into issue new questions of transportation law and fact which had not been contemplated by the motions for summary judgment and supporting affidavits then before the court. Those motions had been presented on the opposing legal theories that concerted action in making any Section 22 rates was either entirely within, or entirely outside, the protection of Section 5a.

The court also held, on what it called a separate "aspect of the case", that even if such rate activities were covered by properly approved agreements, they were actionable if they were engaged in for the purpose of destroying the competition of the petitioners, and that this latter question was for trial and determination by the court and need not initially be submitted to the Commission.[2]

In accordance with this decision, the District Court on April 18, 1958, entered an order (Pet. App. B, p. 48) that the court:

> "While retaining jurisdiction, shall, in its discretion, withhold decision on the interpretation of the

[2] Although this Court plainly had jurisdiction to review this decision on a timely petition for certiorari, the judgment of the Court of Appeals was interlocutory only, and no party sought certiorari at that time.

> Interstate Commerce Act and existing agreements approved under section 5a of said Act, insofar as the challenged practices are concerned, until the Interstate Commerce Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be relieved of the operations of the antitrust laws under the statute, and if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date."

This order dealt only with what the Court of Appeals had called the first or so-called *per se* aspect of the petitioners' claim; the other aspect of the case, which depended upon allegations of a purpose to destroy the competition of the petitioners, was continued within the court's jurisdiction without further action at that time.

Promptly thereafter the respondent railroads filed with the Interstate Commerce Commission a petition for the determination of the questions referred by the court, including the complex questions of relevant transportation fact with respect to the nature of the alleged rate practices and the competitive setting in which they had occurred. These were matters with which the Commission had previously dealt in another very similar context, and which were plainly within its area of expertise. See *All American Airways, Inc. v. Abilene & Southern Ry. Co.*, 297 I.C.C. 313 (1955).

Petitioner air carriers thereupon filed with the Commission a Motion to Dismiss and a Petition for Disclaimer of Jurisdiction. In an order dated January 27, 1959 (Pet. App. C, pp. 49, 50), the Interstate Com-

merce Commission ordered a hearing on the respondents' petition,

> "so far as it seeks a determination as to whether the challenged rate practices are, in fact, covered by one or more of the Section 5a agreements which have been previously approved by this Commission and to which the railroad petitioners refer in said petition."

The Commission's order added that

> "said question, involving an interpretation of the scope of agreements which this Commission has approved and a determination of whether the procedures contained in said agreements were adhered to, is appropriate for administrative determination in aid of the Court."

The Commission further disclaimed jurisdiction of the ultimate legal conclusion, which it described as "a question of law which is not dependent upon factors within the special competence of this Commission" and which it stated as "whether the railroad petitioners can, with respect to the challenged rate practices, be relieved of the operations of the antitrust laws under Section 5a(9) of the Interstate Commerce Act."

In the meantime, on August 8 and December 16, 1958, the Court of Appeals for the District of Columbia Circuit had handed down two *per curiam* orders in another antitrust case in which it held that the opinion of this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, had modified that portion of its prior *Aircoach* opinion which had held that the question of whether concerted rate activities had been entered into for the purpose of destroying competition need not be referred to the Interstate Commerce Commission.

The court stated that it was its view "that the Isbrandtsen opinion modifies the holding of the Aircoach case by requiring that the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Sec. 5a of the Interstate Commerce Act must, *in a case where such issue is the sole or dominant issue,* first be referred to the Commission prior to a court determination of whether such rate reduction violates the anti-trust laws." *Atlantic Coast Line RR Co.* v. *Riss & Co., Inc.*, 267 F. 2d 657, 658-59, Pet. App. E, p. 54 (italics supplied).

Following these developments, the District Court in February, 1959, heard a motion by petitioners to vacate the previous order of reference to the Interstate Commerce Commission, on which, as noted above, the Commission on January 27, 1959, had ordered a hearing. At the same time, it heard a cross-motion by respondents to broaden the reference order by including for consideration by the Commission the additional question of the intent and effect of the challenged railroad rate practices. In due course the District Court entered a memorandum opinion of February 24, 1959 (Pet. App. F, p. 55) and an order of March 2, 1959 (Pet. App. G, p. 59), in which it denied the petitioners' and granted the respondents' motion, found that the question of the intent and effect of the alleged practices was "the sole or dominant issue" involved in the petitioners' conspiracy charges, and supplemented its original order of reference to the Interstate Commerce Commission to include this question.[3]

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[3] Upon entry of this order, and pursuant thereto, the respondent railroads promptly amended their petition to the Commission to include this issue. These administrative proceedings have since

Following refusal of District Judge McGarraghy to certify this interlocutory order for appeal under the Interlocutory Appeals Act of 1958, petitioners sought nevertheless to have it reviewed by the Court of Appeals by the device of a "motion for recall and clarification of mandate" and asked in the alternative that this motion be treated as a petition for mandamus or certiorari to the District Court under the All Writs Statute, 62 Stat. 944, 28 U.S.C. § 1651(a). The Court of Appeals heard oral argument on this motion and on September 23, 1959, denied it by a brief *per curiam* order, containing merely a recitation of the status of the proceedings. Following denial on October 20, 1959, of petitioners' further "motion for clarification or amendment" of this order, and denial on November 2, 1959, of their still further petition for rehearing *en banc*, this petition for certiorari was filed.

REASONS FOR DENYING THE WRIT

I

Petitioners argue earnestly that in substance the *per curiam* order of the Court of Appeals of September 23, 1959, was an "amendment" of the court's original decision of February 25, 1958, making that decision in its entirety also now subject to review on certiorari. As the above chronology shows, however, it would be far more accurate to say that in substance this petition for certiorari is no more than an effort to obtain a review in this Court of an unappealable interlocutory order of the District Court, following failure to obtain

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been stalled, however, by successive requests by petitioners for additional time in which to move or otherwise plead to this amended petition, while they have attempted to have the reference order set aside by the Court of Appeals or this Court.

such a review from the Court of Appeals. While in form directed to denial of a motion by the Court of Appeals, it is for all practical purposes the equivalent of a petition for certiorari to the District Court under the All Writs Statute [28 U.S.C. § 1651(a)]. Compare *Atlantic Coast Line R.R. Co.* v. *Riss & Co., Inc.*, October Term, 1959, No. 156 Misc., motion for leave to file petition for certiorari denied, October 12, 1959, 361 U.S. 804.

The only question open for review here is whether the Court of Appeals abused its discretion in refusing under these circumstances to recall, clarify or modify its previous mandate. This is a question of no public importance whatever, and certainly presents no ground for certiorari. The action of the Court of Appeals in refusing to overturn the District Court's interlocutory order of reference to the Commission is not even determinative of the rights of the particular parties to this litigation; all the substantive questions which petitioners want this Court to review and determine now can be much more appropriately decided on a full record, after completion of the pending proceedings. Even the usual objection in primary jurisdiction cases that unreasonable delay will result from reference to the administrative agency is hardly applicable here; the petitioners themselves have stalled the proceedings before the Commission for a year with a multiplicity of motions and petitions in their effort to obtain review of unappealable interlocutory orders of the District Court and to persuade the appellate courts to dispose of the case on legal issues which will not even be ripe for decision until the controlling factual questions have been resolved.

Under these circumstances, respondents respectfully submit that this petition for certiorari should be denied

without further consideration of the merits of the various questions argued. Some of these questions, at least in part, involve issues determined by the opinion of February 24 and order of March 2, 1959, of the District Court, review of which was unsuccessfully sought by petitioners in their motion to the Court of Appeals which was denied on September 23, 1959. Others of petitioners' questions relate only to issues determined by the original decision of the Court of Appeals of February 25, 1958, which determinations have not since been modified or reconsidered. As we shall show in the remainder of this brief, even if these questions are considered now to be properly presented on this petition, no valid grounds have been shown for a writ of certiorari to review them at this intermediate stage of the litigation.

II

The basic question argued to the Court of Appeals by petitioners in their "Motion for Recall and Clarification of Mandate"—and the principal question sought to be raised here—is whether District Judge McGarraghy was wrong in including in his order of March 2, 1959 (Pet. App. G, p. 59) a provision adding to the matters to be considered by the Interstate Commerce Commission the question of the intent and effect of the railroads' challenged rate practices. This issue, it will be recalled, was the controlling question in the second or conspiratorial aspect of the petitioners' claim, in which they alleged that the purpose of the railroads' Section 22 rate quotations was to destroy the petitioners' competition. Admittedly, this action of the District Court was in accordance with the modification of the Court of Appeals' original *Aircoach* opinion which had been specifically made by that court

in *Atlantic Coast Line Railroad Co.* v. *Riss & Co.*, 267 F.2d 657, 658, *supra*, pp. 8-9. The main substantive question sought to be raised in this petition for certiorari, therefore, is whether the question of the intent and effect of alleged concerted Section 22 rate action claimed to have been taken pursuant to agreements approved by the Commission under Section 5a of the Interstate Commerce Act should first be referred to the Commission where such question is the sole or dominant issue in an alleged conspiracy under the Sherman Act.[4]

In *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, this Court held that its earlier decisions in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, did not require delegation to the Maritime Board of the power to decide the ultimate legal question of the validity of dual rate systems employed by a shipping conference; the opinion of this Court stated, however, that these cases recognize that the courts "while retaining the final authority to expound the

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[4] Compare Petitioners' Question 1, p. 3, and discussion pp. 15-18, 25-27. Petitioners' Question 1 studiedly omits the limitation which was imposed by the Court of Appeals in its *Riss* orders and which was found by the District Court to have been satisfied here, that the question of the intent and effect of the challenged practices must be referred only if it is the "sole or dominant" issue of the conspiracy charge. Petitioners also erroneously imply that the practices themselves are not in any way subject to the Commission's regulatory jurisdiction. This is patently not so. Compare, *e.g.*, the discussion of this matter in the opinion of the Court of Appeals of February 25, 1958 (253 F.2d 877, 882-83, Pet. App. A, pp. 37-39), and the standards of the National Transportation Policy incorporated in Section 5a of the Interstate Commerce Act and set out in the Appendix to this brief, p. 25, below.

statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern" (356 U. S. at 498). This Court further stated specifically that in determining whether certain practices constitute "predatory devices",

> "precise findings by the Board as to a particular system's intent and effect would become essential to a judicial determination of the system's validity under the statute" (356 U. S. at 499).[5]

The Court of Appeals in its *Riss* orders applied this reasoning to concerted Section 22 rate reductions claimed to be within the coverage of Section 5a of the Interstate Commerce Act by holding that

> "the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Section 5a of the Interstate Commerce Act, must, in a case where such issue is the sole or dominant issue, first be referred to the Commission prior to a Court determination of whether such rate reduction violates the antitrust laws" (267 F. 2d 658-9, Pet. App. E, p. 54).

Here the District Court specifically found that the issue of the intent and effect of the Section 22 rate practices involved was the "sole or dominant issue" on the conspiracy aspect of the case, and that accordingly this issue should be referred to the Commission. See Memorandum Opinion of February 24, 1959, Pet.

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[5] Accord: *United States* v. *Radio Corporation of America*, 358 U.S. 334, 347-48; *Southwestern Sugar and Molasses Co., Inc.* v. *River Terminals Corp.*, 360 U.S. 411, 420-21.

App. F, p. 58. Not only does this accord with the teaching of the *Isbrandtsen* case, but consideration of Section 5a of the Interstate Commerce Act itself makes it clear that Congress intended to vest in the Interstate Commerce Commission jurisdiction to resolve this very type of conflict between the competing policies underlying the different statutory schemes embodied in the antitrust laws and the Interstate Commerce Act, using as the governing standard the National Transportation Policy.

Petitioners' argument that the Commission is without power to interpret the scope of approved agreements and of its own orders approving them under Section 5a; or that it cannot properly marshal the relevant transportation facts and apply such agreements and approvals to them in the light of the controlling standards of the National Transportation Policy, is utterly inconsistent with the basic purposes as well as the specific provisions of these important statutory provisions. It also disregards plainly applicable principles laid down in decisions of this Court in closely comparable situations. Compare *United States v. Western Pacific R.R. Co.*, 352 U. S. 59; *Service Storage and Transfer Co., Inc. v. Virginia*, 359 U. S. 171, 179.

Section 5a(2) vests in the Commission alone the power to approve agreements, upon such terms and conditions as it deems necessary, which it finds "by reason of furtherance of the national transportation policy" should be relieved from the operation of the antitrust laws. The National Transportation Policy, the full text of which is set out in an Appendix to this brief (p. 25), is stated in the Act to be directed "to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, *as well as by other means*, adequate to meet the

needs of the commerce of the United States, of the Postal Service and of the National Defense." Among the practices which the Commission is enjoined to encourage are the establishment of reasonable charges for transportation services without "unfair or destructive competitive practices".

The clear intention of Congress was thus to vest the task of reconciling competing statutory policies in the Commission and to give it continuing supervisory authority over the agreements it approves and their effect and impact in practical operation. Compare *Minneapolis & St. Louis Ry. Co.* v. *United States*, December 14, 1959, slip op. pp. 11-13. Particularly is this true in a situation involving an inter-industry controversy over competitive transportation services. As the House Committee on Interstate and Foreign Commerce stated in its report on the Reed-Bulwinkle bill which became Section 5a (H.R. Rep. 1100, 80th Cong., 1st Sess., 1947, p. 5):

> "It is obvious that confusion and uncertainty are inevitable where these two principles of public policy [the antitrust laws and the National Transportation Policy], administered and enforced by different agencies, are applied in such a way that there is conflict between them. It is equally obvious that Congress cannot itself, by legislation, deal with each instance of joint action by carriers to resolve whatever conflict may exist between the principles of the antitrust laws and the national transportation policy.
>
> "The only practical approach to the problem is to grant to a competent administrative agency, as is proposed in the bill, the authority to resolve the conflict in specific instances of proposed joint action by the carriers.

> "Since this problem arises in the relatively circumscribed field of transportation, the agency which is particularly well qualified to exercise this authority is the Interstate Commerce Commission. The bill here reported, therefore, places this responsibility upon that Commission."

Under these circumstances it seems plain that, at least where as here the intent and effect of rate activities claimed to be covered by approved Section 5a agreements is the sole or dominant issue in an alleged antitrust conspiracy, it is not only proper but essential that the matter be referred to the Interstate Commerce Commission for appropriate initial consideration.[6] This is what the District Court's order of March 2, 1959 did, and the matter is now properly pending before the Commission.

III

Another question unsuccessfully urged by the petitioners to the District Court and subsequently to the Court of Appeals, and now sought to be submitted to this Court, concerns the petitioners' alternative claim that the railroads' Section 22 rate quotations to the military authorities constituted *per se* violations of the

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[6] Respondents believe that both the plain provisions of Section 5a(7) of the Interstate Commerce Act and a consideration of its legislative history as a whole indicate that this provision provides an additional basis for Commission jurisdiction to determine the questions which are now pending before it. In this respect respondents respectfully submit that the Court of Appeals was wrong in its analysis of this provision in its decision of February 25, 1958, on the summary judgment appeal. See 253 F.2d at 884-85, Pet. App. A, pp. 41-42. This question, however, is not one which calls for review by this Court on the present record.

Sherman Act, regardless of their intent or effect, and were not exempt by Section 5a. Petitioners argue that the issue of whether or not these alleged rate practices fall within the scope of agreements approved by the Commission under Section 5a should have been withdrawn from the Commission, even though it had been set down for hearing by the Commission's order of January 27, 1959 (Pet. App. C, pp. 49-51); they urge that the inclusion in this same order of the Commission's disclaimer of jurisdiction over the ultimate legal question of the nature of the exemption included in Section 5a(9) required that this matter forthwith be passed upon by the court without awaiting determination of the questions which the Commission had set for hearing. Petitioners rely on *Southwestern Sugar & Molasses Co., Inc.*, v. *River Terminals Corp.*, 360 U.S. 411, 414-15, for the proposition that the reference of an issue to an administrative agency should not be made if the case can be disposed of by an alternatively available determination of law which is "ripe for decision".[7]

The difficulty with this argument is that the question of law which petitioners have asked the courts to decide without awaiting action by the Interstate Commerce Commission is not, as it was in *River Terminals*, an alternative ground "ripe for decision" on which the case can be disposed of. While the petitioners' argument with respect to this question of law has not been

[7] See Question 4, Pet. p. 3, and discussion pp. 23-25. Petitioners apparently also urge that the original decision of the Court of Appeals of February 25, 1958, was in error in ordering *any* reference to the Commission and should also now be reviewed and reversed, even though this aspect of that decision has not since been reconsidered or modified in any way by the Court of Appeals, and no timely petition for certiorari to review that decision was filed. See Question 3, Pet. p. 3, and discussion pp. 18-22.

fully articulated in the petition, the grounds on which petitioners urged both courts below to withdraw the matter from the Commission and summarily dispose of the case were that the rate practices as alleged in the complaint did not constitute "rates, fares, . . . or charges" as those terms are used in Section 5a(2), that such practices as a matter of law were therefore beyond the statutory reach of Section 5a, and that the court should accordingly on this basis reinstate the original summary judgment for the petitioners without awaiting any determination by the Interstate Commerce Commission.

This contention was properly rejected below. In the first place, the question sought to be decided forthwith by the court quite plainly involves a technical transportation question under Section 5a(2) of the Interstate Commerce Act, and one which is quite different from the ultimate 5a(9) question which the Commission disclaimed. Even more important, petitioners' contention is grounded on the fallacious premise that only a question of law is presented and that no issues of fact with respect to the alleged rate practices remain to be decided. As the District Court itself stated in its opinion of February 24, 1959, however, denying petitioners' motion to withdraw the reference to the Commission, the latter was actually "proceeding to a hearing on the *issues of fact* stated in the order" (Pet. App. F, p. 55) (italics supplied).[*] These issues of fact are

[*] The District Court further emphasized this aspect of the hearing ordered by the Commission by stating:

> ". . . the Court is of the opinion that since the Commission has now set for hearing the issues of fact embodied in the Court's order of April 18, 1958, the orderly and expeditious procedure would be to include the issue of intent and effect for consideration and determination by the Commission in a single proceeding" (Pet. App. F, p. 58).

substantial. It is plainly not possible to determine whether certain rate practices were "rates, fares, . . . or charges" or properly fell within the scope of agreements approved by the Commission until there has been a factual determination of what those rate practices were and the competitive setting in which they occurred.[9] All of these things in turn must be determined before there can be a decision on the ultimate legal question of the effectiveness of the exemption—the only question of law which the Commission has disclaimed. This reads precisely on what this Court said in *Isbrandtsen*, that in situations of this sort the courts "while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern" (356 U.S. at 498).[10]

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[9] Petitioners have urged repeatedly to the District Court and to the Court of Appeals that in spite of the fact that the allegations of the complaint with respect to the nature and effect of these rate practices have been denied in the respondents' answers, there are no disputed issues of fact. They have relied for this position on a reference in the Court of Appeals' opinion of February 25, 1958 (253 F. 2d at 879, Pet. App. A, p. 32) to what it called "the essential undisputed facts"—a statement obviously made only for purposes of that summary judgment appeal. *Cf. Griffin* v. *Griffin*, 327 U.S. 220, 234-35; *Helms* v. *Duckworth*, 101 U.S. App. D.C. 390, 396, 249 F. 2d 482, 488, (1957). Neither court below accepted the petitioners' argument. It plainly presents no question appropriate for consideration by this Court.

[10] In *United States* v. *Radio Corporation of America*, 358 U.S. 334, 348, this same principle was approvingly described as "the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action." See also *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 420-21.

The courts below have properly stayed their hand until completion of the proceedings already pending before the Commission.

IV

Petitioners have not been content with arguing here merely the questions presented by the District Court's interlocutory order of March 2, 1959, which was the only real basis for their "Motion for Recall and Clarification of Mandate" in the court below. They have also attempted to raise the principal question presented to and decided against them by the Court of Appeals in the two-year-old summary judgment appeal of February 25, 1958. This is the question of whether, as they contend, *all* Section 22 rates to the Government were intended by Congress to be excluded from the coverage of Section 5a of the Interstate Commerce Act.[11] The original holding of the Court of Appeals that at least some Section 22 rates fall within the coverage of Section 5a has not been modified or even reconsidered by any of the courts below since that decision.

Respondents believe that the extensive legislative history of the Reed-Bulwinkle Act of 1948—the original Section 5a—makes clear that petitioners' contention is without merit.[12] For purposes of this petition for certiorari, however, it should suffice to point out that the amendment to Section 5a of August 31, 1957, 71 Stat. 564, 49 U.S.C. § 22(2) (Pet. App. I, p. 65), has eliminated this question with respect to Section 22 quotations made after that date, and so has deprived it of any

[11] Question 2, Pet. p. 3, and discussion pp. 22-23.

[12] A summary of legislative history references is contained in footnote 11 to the opinion of the Court of Appeals on the summary judgment appeal of February 25, 1958, 253 F. 2d at 881 (Pet. App. A, p. 36).

importance worthy of certiorari. Congress quickly enacted this amendment to rectify for the future the anomalous result of the original District Court decision of July 5, 1957, which granted a summary judgment to the petitioners in this case (later reversed). The specific provision of this amendment that the antitrust exemptions of Section 5a "shall continue to apply" to Section 22 quotations,[13] together with its legislative history,[14] provide further confirmation that Congress originally intended to include Section 22 quotations within the coverage of Section 5a. In any event, however, the enactment of the 1957 amendment certainly eliminated any importance that the question might have beyond this particular litigation.

CONCLUSION

Throughout the petition an attempt is made to emphasize that there is somehow "an unresolved three-way division" among the judges below (p. 16), and

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[13] 71 Stat. 564, 49 U.S.C. § 22(2), Pet. App. I, p. 65.

[14] See, *e.g.*, statement accompanying Conference Report on this amendment (H.R. Rep. 1171, 85th Cong., 1st Sess., 1957, p. 5):

> "This decision was most unexpected, as it had been assumed by the carriers since the enactment of the Reed-Bulwinkle amendment [Section 5a] in 1948 that it applied to section 22 rates in the same manner that it applies to other rates. Furthermore, it is the opinion of those Members of the House who were serving on the House Committee on Interstate and Foreign Commerce at the time the Reed-Bulwinkle amendment was passed that the intention of Congress at the time was in accord with the view taken by the rail carriers. . . . .
>
> "Therefore, the language which the House added to the proposed paragraph (2) of section 22 was intended to make it clear that the Reed-Bulwinkle amendment applies in the case of section 22 rates."

numerous conflicts with decisions of this Court and other federal courts. A picture of utter confusion in the courts below is drawn, with the District Judge in this (*Aircoach*) case said to be following the Court of Appeals' decision in *Riss*, and the District Judge in *Riss* following the Court of Appeals' decision in *Aircoach* (p. 28). All of this is fallacious. There is no conflict among the panels of the court below; in fact, two of the three judges of the unanimous panel below were also members of the unanimous *Riss* panel.[15] Similarly, the finding subsequently made by District Judge Sirica in the *Riss* case was specifically that the question of the intent and effect of the challenged rate practices there was "not the sole or dominant issue of the case" (170 F. Supp. 354, 366), while, as noted above (p. 14), District Judge McGarraghy made precisely the opposite finding here. See opinion of February 24, 1959, Pet App. F, pp. 55, 58.

What does emerge from this petition, however, is that petitioners have now exhausted every device within the ken of imaginative counsel in an effort to find a shortcut method of somehow obtaining a favorable judgment in this case without a trial on the merits, and above all without any kind of hearing before the one body specially qualified by experience and designated by Congress to deal with these highly specialized

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[15] The panel below which denied petitioners' motion for recall and clarification of mandate consisted of Circuit Judges Miller, Bazelon and Burger. In accordance with usual practice in the District of Columbia Circuit, this was the same panel which had decided the original summary judgment appeal in this case on February 25, 1958, but Judge Burger had been substituted for Judge Fahy when the latter disqualified himself.

The panel which decided the *Riss* orders (267 F. 2d 657, 658) consisted of Circuit Judges Bazelon, Bastian and Burger.

transportation problems—the Interstate Commerce Commission.

The present posture of this case is that the facts with respect to the railroads' "challenged rate practices" are now at issue, that the Interstate Commerce Commission is the tribunal which must marshal these transportation facts to provide the basis for judicial action, and that the Commission is similarly the body which must interpret the scope of the applicable Section 5a agreements and its approvals thereof in the light of such facts and of the requirements of the statute. Such a proceeding for these very purposes is now pending before the Commission, and is being stalled only by the pendency of this petition.

The petition for certiorari should be denied.

Respectfully submitted,

STEPHEN AILES,
1100 Shoreham Bldg.,
Washington 5, D. C.

HUGH B. COX,
701 Union Trust Bldg.,
Washington 5, D. C.

DOUGLAS F. SMITH,
11 So. La Salle St.,
Chicago 3, Ill.

EDWARD K. WHEELER,
Southern Bldg.,
Washington 5, D. C.

Attorneys for Respondents

DECEMBER 24, 1959

APPENDIX

The National Transportation Policy, Act of Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, codified under Title 49 U.S.C., preceding §§ 1, 301, 901 and 1001:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."